90-519

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAY D. HIRSCH,

Petitioner,

v.

OAKELEY VAUGHAN UNDERWRITING LIMITED, *et al,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a foreign defendant invokes the Doctrine of Forum Non Conveniens against a resident American citizen plaintiff suing in his own right in a Federal District Court, does the District Court's failure to accord substantial deference to plaintiff's choice of forum authorize affirmance by a Federal Court of Appeals of dismissal of the lawsuit when the alternative forum is a foreign court?

2. When a Federal District Court fails to expressly address and balance the public and private factors relating to a resident American citizen Plaintiff's suit in the United States against a foreign defendant and dismisses the suit based upon forum non conveniens, does such failure constitute abuse of discretion invalidating affirmance of such dismissal by a Federal Court of Appeals when the alternative forum is a foreign country?

3. In resolving the issue of an appropriate forum when the alternative forum is a foreign court, when the defendant is foreign and when the plaintiff in Federal District Court is a resident American citizen suing in his own right, can a Federal District Court's dismissal be properly affirmed when the Appeals Court can not discern the implementation of the "deference" concept?

4. In resolving the issue of an appropriate forum when the alternative forum is a foreign court, when the defendant is foreign and when the plaintiff in federal district court is a resident American citizen in his own right, can a federal district court's dismissal be properly affirmed when the Appeals Court by application of an incorrect standard or scope of appellate review also arrives at a dismissal determination?

LIST OF ALL PARTIES

The parties to the proceeding in the Fifth Circuit Court of Appeals were:

1. Petitioner, JAY D. HIRSCH.

2. Respondents, OAKELEY VAUGHAN UNDERWRITING LIMITED; CHARLES A.B. ST.GEORGE; MARK E.P. ST.GEORGE; EDWARD ST.GEORGE; JAMES ST.GEORGE; OAKELEY VAUGHAN AND COMPANY LIMITED; THE CORPORATION OF LLOYD'S; THE COUNCIL OF LLOYD'S; THE SOCIETY OF LLOYD'S.

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THE SOCIETY OF LLOYD'S, *et al,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, JAY D. HIRSCH, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 31, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unpublished and is reprinted in the appendix hereto. The memorandum decision of the United States District Court for the Southern District of Texas (NORMAN BLACK, D.J.) has not been reported. It is reprinted in the appendix hereto.

JURISDICTION

Petitioner initially brought suit in a Texas District Court located in Houston, Harris County, Texas. Respondents removed the case pursuant to 28 U.S.C. § 1441 (1988), based upon diversity jurisdiction, 28 U.S.C. § 1332 (1976). Respondents filed Motions for Dismissal under Rule 12(b) and sought dismissal based upon the doctrine of forum non conveniens. On December 14, 1988, the Federal District Judge dismissed Petitioner's suit on the basis of forum non conveniens and entered final judgment of dismissal with prejudice. On April 12, 1989, the Federal District Court reaffirmed its dismissal on the basis of the common law doctrine of forum non conveniens.

On Petitioner's appeal, the Fifth Circuit Court of Appeals rendered judgment and opinion of May 31, 1990, affirming the District Court's dismissal. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fifth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1) (1988).

STATEMENT OF THE CASE

Petitioner was, at all times pertinent to this matter, a United States citizen, born in Houston, Harris County, Texas, since 1938. On September 5, 1986, Petitioner instituted suit in the 281st Judicial District Court of Harris County, Texas, against various individuals and several entities associated with Lloyd's and Oakeley Vaughan. By virtue of amendment of that suit, on October 16, 1987, all parties who are now Respondents had been joined. Suit was brought on claims founded on fraud, negligence, breaches of fiduciary duty and contract, conspiracy and statutory violations of Texas consumer and insurance laws.

Petitioner became an underwriting member, or "NAME" of Lloyd's on December 31, 1980. Petitioner was not willing to assume the financial devastation stemming from syndicate risks and losses directly traceable to the failure of Lloyd's to discharge

certain duties and obligations owing to Petitioner as a "member" or "name." These duties were promised to Petitioner within the State of Texas as part of the campaign of solicitation carried on by, and on behalf of, agents and representatives of Lloyd's and the sponsor, namely Oakeley Vaughan Underwriting Limited, which was approved by the COMMITTEE OF LLOYD'S as one of its underwriting agents.

There are only two events linking Petitioner to what the District Court determined to be the more convenient forum, namely, London, England. These two events are: (1) Petitioner's appearance before the ROTA COMMITTEE which meeting lasted about five (5) minutes and occurred in London, England. The *Brochure for United States Applicants for Underwriting Membership* issued by the COMMITTEE OF LLOYD'S explains that the ROTA COMMITTEE is composed of members of the Committee of Lloyd's. Approval by the ROTA COMMITTEE is a Lloyd's imposed requisite to election by the full Committee of Lloyd's; (2) Petitioner's signing of an Underwriting Agency Agreement with Oakeley Vaughan Underwriting Limited.

Besides these two events, all other contact occurred within the State of Texas either by personal contact with Petitioner, or by telephone or mail. All other documents involved in Petitioner's membership application were generated or executed within the State of Texas, more specifically, in Houston, Texas.

Respondents' initial contact with Petitioner involved a personal visit by Wilfred Sherman. Sherman's visit was followed up by an October 11, 1978, letter to Petitioner from Oakeley Vaughan Underwriting Limited's Director, Cavenagh-Mainwaring, who transmitted to Petitioner the *Brochure for United States Applicants for Underwriting Membership*. The brochure laid the groundwork for the subsequent contacts with Petitioner by stating on its first page:

> Any questions with respect to materials contained herein should be addressed to the Agent and/or Member who is sponsoring the application for membership of Lloyd's.

The brochure consists of a thorough explanation of the structure of Lloyd's, the development of syndicates, the exposition of the Corporation of Lloyd's and, with respect to Underwriting Agents, states the following:

> The Underwriting Agent has a duty to his NAMES on the one hand to conduct the underwriting affairs in as efficient a manner as possible, and to the Committee of Lloyd's on the other to see that its requirements are complied with on behalf of the NAMES for whom he acts.
>
> 2.8 Each Member of Lloyd's is required to enter into an Underwriting Agency Agreement with his Underwriting Agency . . . The Underwriting Agent normally is given complete control of the underwriting affairs of the MEMBER.

With the benefits of the representations and consultation involving Wilfred Sherman who had been a member or "name" of Lloyd's since the early seventies, and who held himself out to Petitioner as a Lloyd's "overseas consultant," Petitioner pursued his quest for Lloyd's membership and learned the basic structure of the investment situation through meetings and contacts in Houston, Texas. Petitioner met with Eric Fowler who assisted Petitioner in the preparation of his application and who included references to specific syndicates on the application. Fowler was an official of Oakeley Vaughan Underwriting Limited and represented to Petitioner to be working for Lloyd's. All of the required information for the application was gathered in Houston, Texas. Petitioner was also visited by David Howard and Mark St.George, both of whom indicated to Petitioner that they were Lloyd's representatives who were furthering the interests of Oakeley Vaughan Underwriting Limited and the various St.George Respondents. Petitioner undertook the following activities, all of which occurred within Houston, Texas, involved:

1. Completed a Certificate of Means regarding his personal wealth;
2. Secured a Letter of Credit at Allied Bank of Texas in the sum of 70,000.00 pounds sterling issued to the Corporation of Lloyd's as beneficiary;

3. Executed various documents which implemented the Lloyd's application such as the Lloyd's Premium Trust Deed and Special Reserve Fund Trust Deed which was executed in Houston. Texas, after the ROTA COMMITTEE meeting in London, England;
4. Paid all fees and charges required of him, such as a non-refundable fee of 1,900.00 pounds sterling to the Committee of Lloyd's upon election as a member;
5. Executed the Lloyd's Underwriting Members' Security, also referred to as a Deposit Trust Deed;
6. Executed an APPLICATION FOR UNDERWRITING MEMBERSHIP;
7. Executed a Certificate of Means;
8. Executed and completed a questionnaire involving his assets and income submitted by Oakeley Vaughan (Underwriting) Limited;
9. Executed the UNDERTAKING ON APPLICATION FOR ADMISSION AS AN UNDERWRITING MEMBER OF LLOYD'S.

The time span between Petitioner's application for underwriting membership and election as an underwriting member covered the period between July 28, 1980, and December 31, 1980. Of course, Petitioner had personal contacts within Houston, Texas, prior to that time with Lloyd's representatives, E. R. Fowler and David Howard. Even though these individuals, including Mark St.George, were actually agents and representatives of Oakeley Vaughan Underwriting Limited, they functioned in a dual capacity as representatives of Lloyd's by virtue of two (2) circumstances:

1. Lloyd's knew that agents and representatives of Oakeley Vaughan Underwriting Limited were sponsoring and promoting Petitioner's application for membership;
2. The sponsorship and involvement of a Lloyd's-approved underwriting agent is a necessary and critical aspect of the

entire application procedure as conceived and supervised by Lloyd's.

In short, the conception and structure of application for underwriting membership with Lloyd's focuses on the active participation of a Lloyd's-approved underwriting agent.

Petitioner's key contentions as to why the membership application process is the primary focus for the forum non conveniens analysis are the following:

1. The participation of a Lloyd's-approved underwriting agent in the application process is an absolute requirement of Lloyd's;

2. That the application for membership must contain the syndicate in which the prospective member will participate if membership is approved, is a requirement of Lloyd's;

3. The participation of the underwriting agent in this enterprise is, and constitutes, Lloyd's representation to a prospective member that the underwriting agent is trustworthy and "in good standing" with Lloyd's.

4. It was during 1978, the year in which Petitioner was contacted by Oakeley Vaughan Underwriting Limited about the advantages of "membership" in Lloyd's, through the time that Petitioner was elected as a "member," that events and circumstances occurred which Lloyd's should have discovered and/or disclosed so as to prevent Oakeley Vaughan from acting as Petitioner's sponsor and/or prohibited Oakeley Vaughan from offering participation by Petitioner in certain syndicates.

Therefore, relevant here is a summation of Petitioner's allegations as they relate to the relevant time span of the application process. It will be recalled that Petitioner's Application for Underwriting Membership listed, among others, Syndicates 420, 551, and 861 which were "Oakeley Vaughan" syndicates.

During 1979 substantial misconduct occurred on the part of Oakeley Vaughan with respect to Syndicate 551 which is reflected in the following allegation by Petitioner in the Trial Court:

> Plaintiff would show further that during 1979 Syndicate 551 brought a reinsurance from the Fen-Re Intercommunity Re Pool through the agency of the Defendant, OAKELEY VAUGHAN & COMPANY LIMITED. On or about December 1981, considerable difficulty was being encountered in the market in obtaining recoveries from the Fen-Re. At that particular time Fen-Re owed to Syndicate 551 a very substantial sum. Defendant, OAKELEY VAUGHAN & COMPANY LIMITED paid to Syndicate 551 a sum in excess of 250,000 pounds in early January 1982, being credits due to the syndicate on its reinsurance claims against various reinsurers, including to the extent of 250,000 pounds to Fen-Re, but which claims had not at that time been collected by OAKELEY VAUGHAN & COMPANY LIMITED from such reinsurers. By making such a payment OAKELEY VAUGHAN & COMPANY LIMITED represented to the names on whose behalf the reinsurance was placed that sums due thereunder were recoverable when they knew or should have known that this was not true.
>
> Plaintiff would further show that in its 1981 account, Syndicate 551 underwrote a U.S. Fire Treaty as a reinsurance of the Insurance Corporation of Ireland. Substantial losses are now being claimed which greatly exceed the premium income allocated for this syndicate. With proper management, OAKELEY VAUGHAN UNDERWRITING LIMITED should have been aware of the fact that the original estimates were being exceeded . . .

In further amplification of misconduct relevant to Syndicates 420, 551 and 862, Petitioner alleged with respect to the Oakeley Vaughan Respondents, Oakeley Vaughan Underwriting Limited and its directors, Charles A.B. St.George, James A.B. St.George, Mark E.P. St.George and Edward St.George as follows:

> Defendants Oakeley Vaughan Underwriting Limited, and its directors, as underwriting agents of Syndicates 420, 551 and 862 were fiduciaries of the Names under said syndicates and had a duty to conduct and manage the underwriting affairs of

said syndicates on behalf of its Names in a reasonable and prudent manner and to comply fully with all the requirements and regulations of the Defendant, LLOYD'S, on behalf of the Names for whom it acted. In underwriting for the accounts of its Names, Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors were required to underwrite the amount of premium income provided for by the current regulations of LLOYD'S in relation to the Names, means and deposit. As such, Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors were required to take reasonable steps to insure that the amount of insurance business underwritten in Syndicates 420, 551, and 862 would not cause the syndicate premium allocable to a certain year of account to exceed the syndicate allocated capacity for that certain year of account.

Plaintiff, JAY D. HIRSCH, would show that with respect to Syndicates 420, 551 and 862, the Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors, had consistently overwritten and exceeded the premium income limits for the 1980 through 1983 years of account in violation of the requirements and regulations of the Defendant, LLOYD'S. In short, the management and directors of Defendant, OAKELEY VAUGHAN UNDERWRITING COMPANY failed to properly and adequately monitor, insure and require that the premiums of Syndicates 420, 551 and 862 did not exceed the limits prescribed by the underwriting agency agreement and the LLOYD'S regulations and requirements. Furthermore, the management and directors of Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED, failed to properly protect their syndicates and accounts by appropriating proper reinsurance and stop loss insurance.

In the Trial Court, Petitioner complained that neither Lloyd's nor any of the Oakeley Vaughan Respondents ever made disclosure of these circumstances during the rather lengthy period related to Petitioner's application for membership or at any time thereafter. And, that had timely and proper disclosure been made, the membership application would have been stopped by Petitioner or Petitioner would have proceeded with a different

underwriting agent and syndicates. The misconduct of Lloyd's basically was alleged to have consisted of the failure to adequately monitor or keep itself advised of the practices of the Oakeley Vaughan Respondents and therefore, allowing the processing of a membership application which was clearly flawed.

In considering the action of the Trial Court in ordering dismissal, and that of the Court of Appeals, in affirming the same, several factual aspects of the District Judge's memorandum decision and of the Fifth Circuit's opinion require emphasis:

A. The Contract Focus

1. It was the District Judge's assertion that the "dispute arises out of a contract executed in London in November 1980 effective January 1, 1981, between Plaintiff and Oakeley Vaughan Underwriting Limited."

2. In reacting to the District Court's finding, the Fifth Circuit observed:

   The District Court properly found, however, that Hirsch's contract with Lloyd's was executed in London and designated to be performed in England and that Hirsch traveled to England for purposes of this transaction. (See opinion of Fifth Circuit, p.6).

It appears that the District Court and the Fifth Circuit either are referring to different contracts in their respective opinions, or that the contract referred to by the District Court is the same contract referred to by the Fifth Circuit. The issue is important because of the obvious importance of the "contract issue" in the forum non conveniens analysis.

The record is clear and uncontradicted that Petitioner went to London, England, only one time in connection with his membership application in 1980 when he attended the ROTA COMMITTEE meeting. The Underwriting Agency Agreement, regardless of *where* and *when* it was signed, is only of secondary importance in terms of Petitioner's basic complaints in his lawsuit as an American citizen suing in his own right.

The record demonstrates the violation of a more significant contractual relationship which is referred to as the primary contract and which was the primary basis for Petitioner's suit. Peculiarly, it is mentioned by the Fifth Circuit as "Hirsch's contract with Lloyd's." Petitioner contends that the dispute primarily arises out of this primary contract.

THE PRIMARY CONTRACT

The term primary contract refers to the entire undertaking on the part of Petitioner to respond to Lloyd's solicitation to become a member or "name." The record reflects that the situs of this primary contract is in Houston, Texas, because of the active solicitation of Petitioner in Houston, Texas, by agents and representatives of Lloyd's and because of the performance in Houston, Texas, of many acts required to be performed, and because of Petitioner's assumption of duties and liabilities within Houston, Texas, in connection with this primary contract. In addition, the participation of the Lloyd's underwriting agent, in the membership application process, occurred within Houston, Texas. In that connection, the sponsorship and participation by an underwriting agent approved by Lloyd's in the membership application is part of that contractual undertaking.

For example, the *Brochure For United States Applicants For Underwriting Membership* advises as follows:

> 6.1 In order to be eligible to underwrite insurance at Lloyd's, an individual *must apply* and be accepted as a MEMBER OF LLOYD'S. An application is made through an UNDERWRITING AGENT with the sponsorship of an existing MEMBER OF LLOYD'S . . .
>
> 6.2 The first step in the process of becoming a MEMBER OF LLOYD'S is for the sponsor, with the support of an underwriting agent, to write a letter of nomination to the Membership Department at Lloyd's . . .
>
> 6.6 . . . Once an underwriting agent is chosen he will help the potential member through the application procedure. He will also advise the potential member on which syndicates to

> join for his first year of Lloyd's and the maximum premium income to accept on each syndicate. *These syndicates must be named during the application* . . . (Emphasis added).

On the advice of representatives of Lloyd's, Petitioner's application named Syndicates 420, 551 and 862, along with several others. Further, Petitioner was advised, both through personal representations made in Houston, Texas and through Lloyd's printed materials, sent to Houston, Texas, that the underwriting agent involved in the application for membership had specific duties to the applicant.

Lloyd's acceptance and approval of Petitioner's membership application, without ever advising Petitioner of the improprieties and misconduct of his underwriting agent in syndicates listed in his application, tainted the application process and resulting contractual agreements in the first place. Therefore, Petitioner contends that the membership contract is the PRIMARY CONTRACT. Petitioner would submit that the underwriting agency agreement is only the SECONDARY CONTRACT and therefore, of minor importance in both the Petitioner's suit and therefore, the forum non conveniens analysis.

The membership application involves Petitioner's acceptance of duties and responsibilities in Houston, Texas. These items are reflected in the various documents whereby Petitioner recognized that he may be subject to unlimited liability to the full extent of his wealth, that he was willing to encounter the high risks of underwriting and that he might sustain only losses instead of profits. Therefore, it is the primary contract, Petitioner's membership undertaking, in the first place, that both imposes upon Petitioner solemn obligations and provides to Petitioner implied covenants of good faith and fair dealing. It was based upon a breach of such covenants, among other reasons, that Petitioner was compelled to bring suit.

B. The Litigation Focus

To the District Court, the suit involved a dispute arising out of a contract executed in London, England, by Petitioner, who allegedly traveled there for that purpose. In contrast to this extremely limited, factually erroneous, and hyper-technical view of the District Court is the view of the Fifth Circuit. The Fifth Circuit sees this lawsuit as a test and challenge of major proportions:

> This lawsuit aims at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation. (See Fifth Circuit Opinion, p.7).

The District Court and the Fifth Circuit erred for failure to recognize the suit for what it is, namely, a claim for damages sustained by an American citizen, suing in his own right, and complaining of foreign citizens for defrauding him in his own home town, Houston, Texas.

To simplify issues presented by Petitioner's lawsuit, complaint is made as follows:

1. That Petitioner, an American citizen, was sought out and solicited in his home town, Houston, Texas, for his wealth;

2. That Petitioner was defrauded and deceived through a network of contractual undertakings;

3. That the claim of fraud and deception in the primary contract involved Lloyd's failure to monitor the activities of one of its approved underwriting agents who, as sponsors of Petitioner's application for membership, infected and flawed the application process, so as to "steer" Petitioner to syndicates improperly managed by Oakeley Vaughan Underwriting Limited. In addition, Lloyd's failed to advise Petitioner of its knowledge that the underwriting agent could not be trusted in the selection of syndicates for the application of membership of Lloyd's.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S FORUM NON CONVENIENS ANALYSIS AND APPLICATION CONSTITUTE A STANDARD OF APPELLATE REVIEW WHICH CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

In reviewing the record and the District Court's memorandum decision, the Fifth Circuit sets out its measuring stick at pages 3-4 of its unpublished opinion:

> Our court must affirm the District Court's dismissal either if we agree that Texas was an inconvenient forum or if the District Court had no jurisdiction over the Defendants. If the forum issue is clearer legally and factually, we see no reason to engage in discussion of the latter issue. (Emphasis added).

This approach is in clear conflict with this Court's pronouncement of the scope of appellate review of a trial court's forum non conveniens determinations. The proper scope of appellate review was clearly mandated in *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 102 S. Ct. 252 (1981), in the following terms:

> The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion, where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and submitted its own judgment from that of the District Court.

454 U.S. at 257 (citations omitted).

Given the mandate from this Honorable Court that the Appellate Court's *own judgment* as to forum non conveniens is "out of bounds," it stands to reason that an erroneous application of the scope of appellate review resulted in the affirmance of a trial court's erroneous dismissal because it would reflect only that both Trial Court and Appellate Court favored dismissal. Consequently, where an Appellate Court, as here, has decided on its own that Texas is an inconvenient forum, it would be reluctant to reverse a Trial Court's dismissal even if it properly evaluated the Trial Court's holding and found error in the same. It is for this reason that the examination focuses on the Trial Court's decision which is entitled to "substantial deference" only if that decision properly implements the test inherent in the application of the doctrine of forum non conveniens. *Piper Aircraft* stated:

> . . . where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Of course, it is not always a simple task to detect whether an appellate court decision reflects an exposition of its own judgment or is simply a vehicle for review of the trial court's decision. The appellate decision under attack here appears to be of the former type for the following reasons:

1. The Fifth Circuit states that the District Court's dismissal must be affirmed "if we agree that Texas was an inconvenient forum."

2. Nowhere does the Fifth Circuit claim that the District Court complied with the Piper Aircraft mandate. Instead, the Fifth Circuit merely observed that:

   Hirsch (Petitioner) has failed to point out any significant errors of fact or law that cast doubt on the propriety of the District Court's dismissal. Under these circumstances, we cannot find an abuse of discretion." (Fifth Circuit opinion, p.8).

3. In evaluating Petitioner's claim of being disadvantaged if forced to litigate in England, the Fifth Circuit has clearly again indicated that their test is what the Fifth Circuit thinks. The Fifth Circuit stated:

   As for the remaining 'private interest' factors, Hirsch contends that he would be severely disadvantaged by being forced to litigate against these defendants in England. *We disagree.* (Emphasis added).

4. The Fifth Circuit has a significantly different view and concept of the scope of Petitioner's lawsuit from that of the District Court. This conceptualization by the Fifth Circuit is clearly the result of the exercise and substitution of its own judgment rather than the application of the scope of review mandated by this Honorable Court. To the District Court, Petitioner's lawsuit "arises out of a contract executed in London in November, 1980, effective January 1, 1981, between Plaintiff and Oakeley Vaughan Underwriting Ltd." On the other hand, the Fifth Circuit saw Petitioner's lawsuit as a test of and challenge to the "unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation." It is beyond question that the Fifth Circuit did not defer to the District Court's view of the significance of the dispute in question.

II.

THE FIFTH CIRCUIT'S FORUM NON CONVENIENS ANALYSIS AND APPLICATION CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A.

THE ABANDONMENT OF THE PIVOTAL CONCEPT OF DEFERENCE TO PLAINTIFF'S CHOICE OF FORUM

Regardless of any present uncertainty as to whether the concept of deference to Plaintiff's choice of forum has been "weakened"

or "diluted" or somehow has become "less significant" in a forum non conveniens analysis, there can be no question about the concept's viability. At no time has this Honorable Court set aside this crucial facet of the doctrine of forum non conveniens. In addition, at no time has this Honorable Court held or implied that the concept of deference to Plaintiff's choice of forum is simply perfunctory. The holdings and inferences in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947), *Koster* v. *Lumberman's Mut. Cas. Co.*, 330 U.S. 518 (1947), *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 102 S. Ct. 252, (1981) and *Cauwenberghe* v. *Biard*, 486 U.S. 517, 108 S. Ct. 1945 (1988), clearly require the following with respect to Plaintiff's choice of forum:

1. That the Plaintiff be given a special advantage in the selection of his own country as a forum;

2. That dismissal must be denied unless the balance of factors tilts strongly in favor of the Defendant;

3. That the District Court must consider all relevant public and private interest factors and must balance them in a reasonable manner.

Consequently, as mandated by this Honorable Court, the District Court's decision must do more than recite some theoretical concept about deference. The District Court's decision must demonstrate how within the context of the case, consideration has been given. While this aspect of the forum non conveniens doctrine is important in the decisions to retain a case, this element is absolutely mandatory in a decision *dismissing* a case. This stems from the fact that the doctrine of forum non conveniens demands that, regardless of the retention or dismissal of a case, the District Court must honor and implement the concept of deference to a Plaintiff's choice of forum.

The dismissal by the District Court and the affirmance of that dismissal by the Fifth Circuit are in direct defiance of the judicially mandated requirement of the emphasis of the deference to Petitioner's choice of forum. The only reference to that

concept, by the District Court is the obviously gratuitous recitation written in the District Court's memorandum opinion:

> However, Plaintiff's choice of forum is accorded substantial weight . . . (Memorandum opinion, p.4).

The only comment by the Fifth Circuit with respect to this principal factor of deference to a plaintiff's choice of forum as it was treated by the District Court was as follows:

> The District Court explicitly recognized that 'Plaintiff's choice of forum is accorded substantial weight and the burden is on the Defendants to establish that the balance of convenience of the parties and witnesses strongly favors dismissal'. (See p.5 of Fifth Circuit opinion).

The frightening prospect is that nowhere did the District Court even attempt to analyze and evaluate Petitioner's choice of forum in any manner and this failure receives the endorsement of the Fifth Circuit. The relatively minimal weight which Petitioner's choice of forum received is quite apparent from the District Court's opinion. After deciding that an alternative forum exists, the Trial Court reasoned:

> A primary consideration in determining whether to dismiss a case for *forum non conveniens* is where the relevant events took place. In this case, the contract was executed in England and the place of performance was designated England. (Memorandum opinion p.4).

Only later, does the District Court make the observation that "Plaintiff's choice of forum is accorded substantial weight."

Even though forum non conveniens decisions are committed to the sound discretion of the District Court, the mere statement of the concept of substantial deference, without more, constitutes an abuse of discretion. This is implicit in this Honorable Court's holdings in *Gilbert, Koster, Piper Aircraft* and *Cauwenberghe*.

The affirmance by the Fifth Circuit clearly violates this principle of deference and is in clear conflict with its own decisions and decisions of other circuits.

Even in *Forsythe* v. *Saudi Arabian Airlines Corp.*, 885 F.2d 285 (5th Cir. 1989), a decision relied on in its unpublished affirmance here, the Fifth Circuit states the Trial Court's duty in this respect as follows:

> The District Judge is also required to set out his findings and conclusions supporting a forum non conveniens determination, because we will not perform a de novo review of this issue. at p.290.

Petitioner's complaint here was well stated when the issue was raised in *Lony* v. *E.I. DuPont de Nemours & Co.*, 886 F.2d 628 (3d Cir. 1989), in which appellant *Lony* made the identical complaint as Petitioner here. The Third Circuit first recites the complaint as follows:

> Lony maintains that the District Court merely restated the rule, failed to say how much deference it gave to the plaintiff's choice of forum, as required by *Lacey*, and, in fact, gave it no deference at all. at p.634.

The Third Circuit's reaction was concise, fair and clearly mandated by the applicable holdings of this Honorable Court. At the outset the Third Circuit stated in response:

> We cannot say that the District Court gave no deference at all to Plaintiff's choice of forum, but it did little beyond restating the rule and filling in the names of the parties. In this case, more than that is required of the District Court.

The Third Circuit then made a partial explication of the duty of the District Court with respect to the handling of the concept of deference to a Plaintiff's choice of forum in a forum non conveniens determination. The Third Circuit stated:

> The District Court must assess whether the considerable evidence of convenience has in this case overcome any reason to refrain from extending full deference to the foreign Plaintiff's choice.

It was the District Court's failure to reason through the analysis of the concept of deference to Plaintiff's choice of forum which led to reversal there. In the view of the Third Circuit:

> The District Court's failure to give adequate consideration to these questions and to make a determination based on the facts of this case was an abuse of discretion and constitutes reversible error.

In *Lacey* v. *Cessna Aircraft Co.*, 862 F.2d 38 (3d Cir. 1988), the Third Circuit gave an excellent exposition of abuse of discretion instances of district court failures such as:

1. Failure to hold defendants to their proper burden on forum non conveniens motion or failure in weighing relevant factors *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235, 102 S. Ct. 252 (1981).

2. Failure to weigh the relative advantages of each forum but only a consideration of the drawbacks of one, has led to reversal on the basis of abuse of discretion. *Founding Church of Scientology* v. *Verlag*, 536 F.2d 429, 436 (D.C. Cir. 1976).

The Fifth Circuit's affirmance violated the accepted and appropriate form of appellate review of forum non conveniens determinations. In this area, the technique has been the Trial Judge's consideration of factors applicable to such determinations. The consequence of this technique for the scope of appellate review is well set out by Judge Friendly in *Indiscretion About Discretion*, 36 EMORY L.J. 747, 770, 771 (1982):

> If he has faithfully checked out and correctly decided each item, his determination should usually be allowed to stand. Per contra, if he has neglected or misapprehended items that would operate in favor of the losing party, an appellate court will have sound basis for finding that discretion was abused.
>
> Once it has been deemed appropriate to limit the range of discretion, whether through the announcement of a principle

> of preference or the specification of factors, it becomes necessary that the trial court articulate the basis for its decision. Otherwise, it will not be possible for an appellate court to determine whether the trial court's decision rests on an application of the proper rule or the mistaken assumption of some other rule . . . the desirability of a statement of reasons is beyond contest.

In summation, the truth of the meager references by the District Court and Fifth Circuit opinions about Plaintiff's choice of forum is:

1. There never was any discussion or evaluation about Plaintiff's chosen forum;
2. The concern was limited to listing the reasons why the foreign court was an appropriate forum.

The decision of the District Court, and its affirmance by the Fifth Circuit, violate, among other concepts, the concept that a Plaintiff's choice of forum requires the most substantial deference. The District Court must be in a position to accomplish the analysis with due deference to Plaintiff's choice of forum because "the District Court generally becomes entangled in the merits of the underlying dispute." *Cauwenberghe, supra,* at 528.

THE FAILURES OF THE DISTRICT COURT AND OF THE FIFTH CIRCUIT WITH RESPECT TO PETITIONER'S CHOICE OF FORUM

1. Nowhere is Petitioner's nationality, citizenship, or residence noticed or indicated by the District Court or the Fifth Circuit. Petitioner is, in fact, an American-born citizen who has resided all of his life in Houston, Texas, with the exceptions of education and military service requirements that took him to other locations.
2. Nowhere does the District Court or the Fifth Circuit discuss the nexus between the lawsuit and the forum chosen by Petitioner. The nexus consists of extensive solicitation of Petitioner in Houston, Texas, by agents and representatives of

> Lloyd's. The nexus further consists of what has been earlier described as the primary contract, the entire contractual undertaking whereby Petitioner became a Lloyd's underwriting member. Practically all items or component parts of this contractual undertaking occurred in, or were executed in, Houston, Texas.

The failure to analyze and evaluate these circumstances relevant to Petitioner's choice of forum violates this Honorable Court's mandate. The process and procedure utilized by both the Trial and Appellate Court are in opposition to this Honorable Court's opinions and holdings on the matter as well as the holdings and decisions of other circuits.

B.

THE ABANDONMENT OF 'PROTECTIVE CONDITIONS' IN CASE OF DISMISSAL TO A FOREIGN COURT

Petitioner's lawsuit was dismissed with prejudice by the District Court without the imposition of "protective conditions" which are usually involved when a District Court has determined that a foreign land, far away from an American citizen, is a more "appropriate forum." The affirmance of this dismissal in the manner undertaken by the Fifth Circuit is in clear conflict with the usual practice of that Circuit and others. The customary practice of the Fifth Circuit is to reverse and remand a District Court's outright dismissal so as to require and ensure the inclusion of appropriate conditions to protect the dismissed plaintiffs. *See Vaz Borralho* v. *Keydril,* 696 F.2d 379, 394-95 (Former 5th Cir. 1983), and *Diaz* v. *Humboldt,* 722 F.2d 1216, 1219 (5th Cir. 1984). As late as 1987, the Fifth Circuit observed, in its opinion *In re Air Crash Disaster,* 821 F.2d 1147, 1156 (5th Cir. 1987) (*en banc*), *vacated sub.nom., Pan Am World Airways, Inc.* v. *Lopez,* 490 U.S. , 109 S. Ct. 1928 (1989) *aff'd in part and vacated in part,* 883 F.2d 17 (5th Cir. 1989) that "only an outright dismissal with prejudice, could be more 'outcome — determinative' than a conditional dismissal to a distant forum in a foreign land."

With respect to the failure of the Fifth Circuit to reverse and remand for inclusion of protective orders, the Fifth Circuit is also in conflict with the practice in other circuits. *See Robertson, Forum Non Conveniens In America and England: "A Rather Fantastic Fiction"*, 103 L.Q.REV. 398, 408-409 (1987).

In spite of the clear cut practice of other circuits and in spite of its own practice, the Fifth Circuit here simply affirmed the District Court's dismissal with prejudice. This failure by both the District Court and Fifth Circuit deserves consideration in view of the uncertainties of litigation in a foreign land. Ironically, the Fifth Circuit relies on *Forsythe* v. *Saudi Arabian Airlines*, 885 F.2d 285 (5th Cir. 1989), in which an American citizen was remitted to Saudi Arabia. The Fifth Circuit in that case vacated and remanded to the District Court as follows:

> . . . we believe that the Court should have requested certain minimal stipulations from the defendant to protect Forsythe's opportunity to seek relief in the Saudi Arabian forum.
>
> Therefore, we VACATE the judgment dismissing Forsythe's lawsuit with prejudice and REMAND for entry of a judgment of dismissal without prejudice conditioned on Saudi's agreement to submit to the jurisdiction of the Courts of Saudi Arabia and to waive any defense of limitation.

Petitioner's lawsuit, it will be recalled, was dismissed with prejudice by the District Court. The Fifth Circuit simply affirmed that action.

C.

ABANDONMENT OF ESTABLISHED CONCEPTS OF DETERMINING AND REVIEWING FORUM NON CONVENIENS DISMISSALS

The decision by the Fifth Circuit Court of Appeals, requires this Honorable Court's examination. Its danger lies in the fact that this has been accomplished by several impermissible techniques employed by the Fifth Circuit:

1. Permitting too much discretion of the Trial Court by failing to take that Court to task for abandoning the concept of

deference to a Plaintiff's choice of forum and for permitting as justifiable the District Court's selective reading and interpretation of the record. In fact, whatever factual circumstances do not support the dismissal oriented weighing process have simply been ignored.

2. Permitting too much discretion in formulating an opinion around the same dismissal oriented circumstances without consideration of the proper scope of appellate review.

For example, in the Appellate Court's discussion of "private interest" factors, the Court listed the issue of enforceability of any resulting judgment. The Court went on to state:

> The district court did not consider whether any judgment obtained by Hirsch would be enforceable in Texas as opposed to England where the defendants reside.

Instead of evaluating the failure of the District Judge in this respect, the Fifth Circuit passes judgment on the argument made by Petitioner on this matter.

With respect to the issue of the "local interest" factor, both District Court and Fifth Circuit are totally oblivious to the "local interest" aspect of an American citizen's plight of the type that befell Petitioner.

For example, nowhere is there even the slightest attempt or pretext of attempt to evaluate any convenience-related factors and circumstances as a result of Plaintiff being a resident American citizen. Further, there is no discussion or analysis of the real possibility of anti-American bias to Plaintiff from the vantage point of a foreign forum.

The concept of deference to a plaintiff's choice of forum, particularly when that plaintiff is an American born resident citizen suing in his own right to protect himself from foreign misconduct occurring in his home town, has never been eliminated or even circumscribed as a most crucial aspect of the application of the test related to a claim of forum non conveniens.

III.

THE FIFTH CIRCUIT'S FORUM NON CONVENIENS ANALYSIS AND APPLICATION IN AN "AMERICAN PLAINTIFF V. FOREIGN DEFENDANT" CASE RAISE IMPORTANT AND UNRESOLVED PROBLEMS WHEN THE ALTERNATIVE FORUM IS A FOREIGN COURT.

Since the adoption of the doctrine of forum non conveniens by the federal judiciary, no case in which an American citizen residing in the United States who sued a foreign defendant in his own right, when the alternative forum was a foreign court, has ever been accepted for review by this Court. Because no cases from this particular group have ever been granted review in this Court, great uncertainty exists as to a variety of matters in this area of the law as applicable to "American Plaintiff v. Foreign Defendant" cases when the only alternative forum is a foreign court.

THE PROBLEM OF WEIGHING DEFERENCE TO PLAINTIFF'S CHOICE OF FORUM

The seminal case of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 67 S. Ct. 839 (1947), was a domestic forum non conveniens controversy involving the choice between United States District Courts in New York or Virginia, two sister states. *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 102 S. Ct. 252 (1981), involves the situation of a foreign Plaintiff seeking to benefit from an American Court's application of American law.

In cases involving American Plaintiffs suing in their own right, the approach of the indefeasible right to litigate at home has clearly been abandoned. However, the pronouncements in *Piper Aircraft Co.* clearly leave unanswered how much deference the Trial Court must give and extend to the American Plaintiff's choice of forum. In short, how much more suitable must the foreign forum be before dismissal of an American claimant's suit is appropriate? Also the criteria for determining suitability are

unclear. This Court stated in *Piper Aircraft Co.*, 414 U.S. at 255 n.23:

> A [U.S.] citizen's forum choice should not be given dispositive weight . . . Citizens or residents deserve somewhat more deference than foreign plaintiffs, but . . . if the balance of convenience suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.

The confusion among the circuits as to the weighing process is evident. For example, significant uncertainty pervades the Fifth Circuit. The Fifth Circuit required a showing of a material injustice before permitting a Trial Court to exercise its discretion to "deny a citizen access to the courts of this country". *Burt* v. *Isthmus Development Co.*, 218 F.2d 353 (5th Cir. 1955). However, in *Pacific Employers Insurance Co.* v. *M/V Capt. W.D. Cargill*, 751 F.2d 801 (5th Cir. 1985), the Fifth Circuit reevaluated *Burt* in the light of *Piper Aircraft Co.* v. *Reyno, supra*, and derived the following meaning from *Piper Aircraft Co.*:

> "Thus, despite Pacific's argument that as a United States citizen its choice of a home forum is entitled to greater deference by a United States Court than a foreigner's choice, a United States Court in a forum non conveniens case is not required to make its determination on that factor alone, nor would it have abused its discretion in not heavily weighing that factor."

Thereafter, the Fifth Circuit again had occasion to express and apply its view of the kind of "weighing" involved in an American citizen's choice of American forum in a suit involving basically foreign defendants where the alternative forum was a foreign land. In *Schexnider* v. *McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987), with full view of the *Piper Aircraft Co.* wording on deference to choice of forum by an American citizen and by a foreigner, the Fifth Circuit stated at 1163:

> . . . it is also true that there is ordinarily a strong presumption in favor of the Plaintiff's choice of forum that may be overcome only when the private and public interest factors clearly point toward trial in the alternative forum . . .

and at 1164:

> Because the factors pointing against the strong presumption in favor of the Plaintiff's choice of forum in this case are slight, we conclude that the district court abused its discretion by dismissing Schexnider's suit.

Consequently, both post-*Piper Aircraft* decisions from the Fifth Circuit can only be reconciled on the point of deference to Plaintiff's choice of forum with a measuring stick which says: (1) a Plaintiff's choice of forum is to be invested with a strong presumption and great deference is due a Plaintiff's choice; (2) it is not an abuse of discretion if a Plaintiff's choice of forum is not heavily weighted.

Consequently, when these views are applied into the instant case, what does the Fifth Circuit mean when it observes:

> The district court explicitly recognized that plaintiff's choice of forum is accorded substantial weight . . . (Fifth Circuit opinion, p.5).

With the confusion or uncertainty pervading the Fifth Circuit, other circuits, such as the Eighth Circuit raise more questions on the issue of how much deference is to be accorded an American resident citizen in view of *Piper Aircraft*.

The Eighth Circuit in *Lehman* v. *Humphrey Cayman, Ltd.*, 713 F.2d 339 (5th Cir. 1983) *Cert. Den.*, 464 U.S. 1042 (1984), has interpreted *Piper Aircraft* as equating, in the analysis for forum non conveniens, "Plaintiff's residence" with "significant concern" to be considered by the Trial Court. Nevertheless, the Eighth Circuit still appears to be following the principle that "Plaintiff's choice of forum should rarely be disturbed." And even though the Fifth Circuit has re-evaluated *Burt* v. *Isthmus Development Co.* in the light of *Piper Aircraft*, so as to deprive it of much of its fervor in deference to the Plaintiff's choice of forum, the Eighth Circuit is not reluctant to refer to the *Burt* case in the post-*Piper Aircraft* decisions. It should be noted that this Honorable Court denied a Writ of Certiorari with respect to the Eighth Circuit's opinion in *Lehman* v. *Humphrey Cayman, Ltd.*, supra.

In summation, the prevailing uncertainty as considered in the group of cases involving American resident citizens suing a foreign defendant in an American court in connection with claims arising in the United States, raises the following questions:

> Has *Piper Aircraft* left intact the strong deference to an American plaintiff's choice of forum in the United States Courts that prevailed prior to *Piper* or has there been an "weakening" or "dilution" of that concept of deference?
>
> If there has been a "weakening" or "dilution," does that only apply to foreign plaintiffs suing in United States Courts?
>
> If the "dilution" or "weakening" applies only to foreign plaintiffs, what is the current applicable standard of deference to plaintiff's choice of forum for the American plaintiff who is a resident citizen suing a foreign defendant in his own right on the basis of significant transactions occurring in the plaintiff's chosen forum?

Consequently, in the weighing process to accommodate the appropriate deference to Plaintiff's choice of forum, only indecision has emerged and only confusion can result.

CONCLUSION

This request for Supreme Court intervention involves the preservation of the principle of deference to a plaintiff's choice of forum as enunciated in this Honorable Court's decisions and the preservation of the proper scope of appellate review as mandated in *Piper Aircraft*.

As to the concept of deference, the District Court stated the concept and thus proceeded to state the reasons why London, England, was a more appropriate forum for Petitioner who is suing in his own right, is a born, and resident American citizen whose primary transaction with Lloyd's and his underwriting agent, Oakeley Vaughan Underwriting Limited occurred in Houston, Texas, and not in London, England. The District Court never even discussed any advantages or disadvantages regarding the Petitioner's choice of forum. That aspect of the forum non conveniens analysis was never even mentioned.

The Fifth Circuit failed to be governed by the limited scope of review as mandated by Piper Aircraft, never discussed or evaluated Petitioner's choice of forum and affirmed, thereby violating the holdings and practice in forum non conveniens even in other Fifth Circuit cases.

The District Court and the Fifth Circuit have violated the applicable concepts pronounced by this Honorable Court with respect to the doctrine of forum non conveniens. In a period when more and more American resident citizens, such as Petitioner, become investors as a result of solicitation and entanglement occurring in the United States, foreign defendants should not have the benefit of improper application of the doctrine of forum non conveniens to force American citizens into foreign courts to seek redress for misconduct occurring in the local forum. For these reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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August 29, 1990

No. 89-2563

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAY D. HIRSCH,

Plaintiff-Appellant,

versus

OAKELEY VAUGHAN UNDERWRITING LIMITED, *et al,*

Defendants-Appellees.

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(CA H 87 3727)**

(May 31, 1990)

Before CLARK, Chief Judge, THORNBERRY and JONES, Circuit Judges. EDITH H. JONES, Circuit Judge:[1]

Appellant Jay Hirsch applied to become and was elected an underwriting member of the Society of Lloyds, London on December 31, 1980. As an underwriting member, or "Name," Hirsch was required to enter into an underwriting agency agreement through which he participated in syndicates which issue policies and contracts of insurance. Hirsch chose to participate in several Lloyds syndicates that were managed by the Oakeley Vaughan and St. George defendants. When the Oakeley Vaughan syndicates sustained losses so large that they could not be covered out of available income, the Corporation of Lloyds, which is the staffing arm of the Society of Lloyds, at the request

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of Oakeley Vaughan, made a "cash call" upon Hirsch and other syndicate members. Hirsch refused to pay. Instead, he filed suit in Texas state court against entities associated with Lloyds and Oakeley Vaughan and the St. George defendants. He alleged claims founded on fraud, negligence, breaches of fiduciary duty and contract, conspiracy, and Texas statutory violations. He asserted that Lloyds knew or should have known of mismanagement within the Oakeley Vaughan syndicates at the time he joined them. The state court granted a temporary injunction preventing Allied Bank (now First Interstate) from honoring a letter of credit obtained by Hirsch in favor of the Corporation of Lloyds. In October 1987, the Lloyds defendants removed the case to federal court, where all defendants moved to dismiss for lack of personal jurisdiction and forum non conveniens. The district court agreed that Texas is not a convenient forum for litigating the parties' claims, and it accordingly dismissed.[2]

On appeal, we are asked by the appellees to determine whether Hirsch preserved his right to argue against the forum non conveniens decision and whether there is jurisdiction over the Oakeley Vaughan defendants. Hirsch contests the sufficiency of the district court's findings, the merits of its decision, and the court's refusal to permit more discovery before it decided to dismiss. We shall consider each of these arguments in turn.

Although we agree with the appellees' criticism that Hirsch briefed the issue of forum non conveniens in the most perfunctory manner, it is clear that he did not waive or concede that issue in the district court. His brief in response to Oakeley Vaughan's Motion for Stay Pending Arbitration and Motion for Dismissal for Forum Non Conveniens specifically denied that the latter option was available to the district court on the facts or law of the case. Apparently, Hirsch thought that many of the arguments against forum non conveniens effectively overlapped with those concerning personal jurisdiction, the issue he briefed at length. In any

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[2] The court dissolved the injunction against First Interstate; Hirsch has not appealed this decision.

event, the district court addressed the issue on its merits without making reference to Hirsch's waiver, and we likewise reach the merits.

Next, Oakeley Vaughan defendants suggest that before addressing the issue of forum non conveniens, we must find that the district court had jurisdiction over the defendants. In *Gulf Oil Corp.* v. *Gilbert,* the Supreme Court stated that " . . . the doctrine of forum non conveniens an never apply if there is absence of jurisdiction or mistake of venue." *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 504, 67 S.Ct. 839, 841 (1947). This statement reflects a truism rather than a rule enunciating the priority in which a federal court must address the issues before it. Our court must affirm the district court's dismissal either if we agree that Texas was an inconvenient forum or if the district court had no jurisdiction over the defendants. If the former issue is clearer legally and factually, we see no reason to engage in discussion of the latter issue. Additionally, there is precedent in our court for avoiding thorny jurisdictional issues in favor of affirming a district court's dismissal for forum non conveniens. Syndicate 420 at *Lloyds London* v. *Early American Insurance Co.,* 796 F.2d 821, 826 and 831 (5th Cir. 1986). See also, *Texas Employers' Ins. Ass'n.* v. *Jackson,* 862 F.2d 491, 497 n.8 (5th Cir. 1988) *(en banc), cert. denied,* 109 S.Ct. 1932 (1989). Accordingly, we will pretermit any discussion of the district court's personal jurisdiction over the defendants.

We arrive next at the issue of forum non conveniens. Hirsch acknowledges that we may only overturn the district court's dismissal upon a showing of abuse of discretion. Syndicate 420, 796 F.2d at 827-28. The parties are agreed that the doctrine permits a dismissal only after the district court has balanced public and private interest factors related to "the ultimate inquiry . . . where trial will best serve the convenience of the parties and the ends of justice." *Koster* v. *Lumbermen's Mutual Cas. Co.,* 330 U.S. 518, 527, 67 S.Ct. 828, 833 (1947). This court has previously held that a district court considering a motion to

dismiss for forum non conveniens is required first to determine if an adequate alternative forum exists to entertain the case, and then to weigh the public and private interest factors to determine whether the balance favors dismissal. *In re: Aircrash Disaster Near New Orleans*, 821 F.2d 1147, 1165-66 (5th Cir. 1987) *(en banc)*, vacated and remanded on other grounds sub non *Pan Am World Airways, Inc.* v. *Lopez*, ... U.S. ....., 109 S.Ct. 1928 (1989). Here, however, apart from asserting the superiority of a Texas forum to hear his lawsuit, Hirsch did not contest the adequacy of the English court. In fact, other plaintiffs are pursuing similar claims against the appellees in England right now.

The factors bearing on the "private interest" of the litigants before the court include the accessibility of proof and witnesses; the enforceability of any resulting judgment; the ease and expense of litigation in the forum; and other relative advantages and obstacles to a fair trial. The "public interest" factors include the local interest in having a local controversy decided at home; the burden imposed upon jurors within the forum; and the necessity of applying foreign law and possibility of conflicts of law. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 508-09, 67 S.Ct. at 843; *Kempe* v. *Offshore Drilling & Exploration Co.*, 876 F.2d 1138 (5th Cir. 1989); *Forsythe* v. *Saudi Arabian Airlines*, 885 F.2d 285 (5th Cir. 1989).

The district court succinctly identified and applied those private and public factors as to which there might be any dispute. The district court explicitly recognized that "plaintiff's choice of forum is accorded substantial weight and the burden is on the defendants to establish that the balance of convenience of the parties and witnesses strongly favors dismissal." Memorandum opinion at 4, citing *Piper Aircraft* v. *Reyno*, 454 U.S. 235, 102 S.Ct. 252 (1981). We shall briefly discuss each of the pertinent factors and the district court's handling of each.

The district court noted that as to the convenience of the parties and the anticipated witnesses, except for plaintiff and First

Interstate Bank, which was only tangentially involved because of the letter of credit, all other defendants and witnesses are English citizens. In this court, Hirsch takes the position that he would call other American witnesses and that some English witnesses have already testified by deposition. Whether he so informed the district court does not appear of record. The district court properly found, however, that Hirsch's contract with Lloyds was executed in London and designated to be performed in England and that Hirsch traveled to England for purposes of his transaction. Insofar as Hirsch attacks the method by which Lloyds oversaw the performance of underwriting agents such as Oakeley Vaughan, the documentation and witnesses must be in England. The logistical scale tips strongly toward England.

The district court did not consider whether any judgment obtained by Hirsch would be enforceable in Texas as opposed to England where the defendants reside. Hirsch's argument in this court that he could enforce a Texas judgment against the defendants is totally conclusory and highly dubious. Hirsch is most persuasive in suggesting that his interest in revoking his letter of credit could be recognized in Texas. However, that possibility became moot when the district court entered its unappealed order dissolving the injunction which restrained First Interstate Bank from making payment on the letter of credit. Significantly, Hirsch does not contend that he could not enforce any judgment against the English defendants in England.

As for the remaining "private interest" factors, Hirsch contends that he would be severely disadvantaged by being forced to litigate against these defendants in England. We disagree. The district court observed that approximately 40 of Hirsch's fellow underwriting members, including United States citizens, are presently pursuing a lawsuit in the High Court of Justice in London against these defendants. Hirsch has not shown that he is unable to join that lawsuit or to commence his own lawsuit in England. Although Hirsch resists the finding that he will not suffer undue prejudice by being remitted to the English courts, we have previously upheld a forum non conveniens dismissal against

similar claims by an American plaintiff. *See, e.g., Forsythe, supra.*

With respect to the "public interest" factors, the district court concluded that English statutory laws would be applied and that English courts have a significant "local interest" in resolving the disputes internal to the operation of Lloyds. Despite Hirsch's insistence that his claims are governed by Texas law, we agree with the district court's decision to the contrary. This lawsuit aims at the heart of the unique self-regulatory mechanism within Lloyds, which is a product of complex English legislation. Further, unlike the plaintiff in *Kempe* v. *Ocean Drilling & Exploration Co.*, 876 F.2d 1138 (5th Cir. 1989), Hirsch has not asserted that English law deprives him of any remedies or imposes additional burdens upon his claims apart from possibly depriving him of a jury trial. Even if that were the case, it does not necessarily defeat a forum non conveniens dismissal. *See Kempe,* 876 F.2d at 1145.

Hirsch has failed to point out any significant errors of fact or law that cast doubt on the propriety of the district court's dismissal. Under these circumstances, we cannot find an abuse of discretion.

There remains Hirsch's contention that the district court deprived him of an opportunity to secure proof necessary to contest dismissal for forum non conveniens. Ironically, Hirsch contends that he was "prepared to take these depositions in Texas, New York, London, or wherever else could have been agreed upon . . .". This statement undercuts his alleged inability to pursue litigation abroad. Be that as it may, Hirsch never suggested in the district court that he needed this discovery for purposes of disputing the forum non conveniens issue, and we decline to consider this belated contention. As the Supreme Court noted in *Piper Aircraft,* "[r]equiring extensive investigation would defeat the purpose of [the] motion." 454 U.S. at 258.

For the above-stated reasons, we *AFFIRM* the judgment of the district court.

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAY D. HIRSCH,
Plaintiff

vs.

OAKELEY VAUGHAN, *et al*,
Defendants

CIVIL ACTION
NO. H-87-3727

ORDER

Pending before the Court are Defendants' motions to dismiss pursuant to Rule 12(b) and forum non conveniens as well as the motion of First Interstate Bank to dissolve the temporary injunction.

Summary of Facts

This is a diversity suit. The Plaintiff has alleged breaches of contract and fiduciary duty, tortious acts, and statutory violations of Texas consumer and insurance laws. The dispute arises out of a contract executed in London in November, 1980, effective January 1, 1981, between Plaintiff and Oakeley Vaughan Underwriting Ltd. It appears that the initial contact between Plaintiff, an experienced attorney, and the Defendants was through Mr. Wilfred Sherman, the Plaintiff's English cousin, who is not a named Defendant.

Plaintiff agreed to invest in his capacity as a "member" or "name" at Lloyds. This agreement further stipulated that the Plaintiff's role was passive and he would not be permitted to actively participate in any insurance-related activity. As an investor in the several syndicates, he risked sharing a proportion-

ate amount of underwriting gains or losses. During the years 1981, 1982, and 1983, the syndicates experienced losses. The Plaintiff has refused to pay his share and has obtained a temporary injunction preventing First Interstate Bank from honoring a letter of credit, requested by the Plaintiff, in favor of the Corporation of Lloyds.

Initially, the Plaintiff filed this suit in the 281st Judicial District Court of Harris County, Texas. It was later removed to this Court by the Defendants.

Now pending before the Court are motions to dismiss filed by the following Defendants: Oakeley Vaughan Underwriting Ltd.; Charles A. B. St. George; James St. George; Mark E. P. St. George; Edward St. George; Oakeley Vaughan and Company, Ltd.; The Corporation of Lloyds; The Council of Lloyd's; and The Society of Lloyd's. Also pending is First Interstate Bank's motion to dissolve the temporary injunction.

Jurisdiction and Forum Non Conveniens

The Defendants' motions to dismiss are based upon lack of *in personam* jurisdiction pursuant to Rule 12(b) and *forum non conveniens,* as codified in 28 U.S.C. § 1404(2). The Plaintiff bears the burden of proof to establish that the Defendants had "minimum contacts" with Texas sufficient to allow the Court to exercise personal jurisdiction over the foreign Defendants. *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 316 (1945). The Court recognizes that the very nature of the business in which the Defendants are engaged represents a world wide presence of operations. Therefore, it is necessary to determine whether this Court has jurisdiction over the non-resident Defendants. *Zac Smith & Co.* v. *Otis Elevator Co.,* 734 S.W.2d 662, 664 (Tex. 1987).

Although there is evidence that a representative of Oakeley Vaughan and Company, Ltd. met the Plaintiff in Houston, Texas for one day to discuss a matter unrelated to this case, and there were communications both by mail and telephone, the Court is

unable to find substantial contacts with this Defendant sufficient to establish *in personam* jurisdiction. While there may be some question as to whether this Court can dismiss all the Defendants due to a lack of personal jurisdiction there is no question the doctrine of *forum non conveniens* applies to all the Defendants in this case.

When considering a dismissal based on *forum non conveniens,* the Court must first determine if an alternative forum exists, and if so, "balance and consider both the private interests and public interests at stake in the choice of forum." *Cowan* v. *Ford Motor Co.,* 713 F.2d 100, 103 (5th Cir. 1983). In this case, London, England is an alternative forum. The District Court has wide discretion in determining whether that forum is more appropriate based on the convenience of the parties and the interest of justice. *Weber* v. *Coney,* 642 F.2d 91 (5th Cir. 1981).

A primary consideration in determining whether to dismiss a case for *forum non conveniens* is where the relevant events took place. In this case, the contract was executed in England and the place of performance was designated as England. It is undisputed that the Plaintiff traveled to England for the purposes of this transaction.

As to the convenience of the parties and the anticipated witnesses, it appears that, with the exception of the Plaintiff and First Interstate Bank, who is only involved in the ancillary matter of the letter of credit, all other Defendants and witnesses are English citizens. However, Plaintiff's choice of forum is accorded substantial weight and the burden is on the Defendants to establish that the balance of convenience of the parties and witnesses strongly favors dismissal. Nonetheless, a finding that trial in Plaintiff's chosen forum would be burdensome is sufficient to support a dismissal based on *forum non conveniens. Piper Aircraft* v. *Reyno,* 454 U.S. 235, rehearing denied, 455 U.S. 928 (1981).

There are additional factors in this case which weigh in favor of dismissal based upon *forum non conveniens.* The choice of law would dictate that English statutory laws be applied. In addition, since the Lloyd's market is regulated by the United Kingdom, there is significant local interest in the English courts to resolve the issues in dispute. Also, an identical proceeding is pending in the high court of justice in London, brought by approximately forty of Plaintiff's fellow underwriting members, including United States citizens, against these Defendants. Plaintiff may join this suit or bring a similar one in England.

Texas Cause of Action

Plaintiff has also alleged violations of Texas' Deceptive Trade Practices Act and the Texas Insurance Code. Because Plaintiff's participation in The English syndicate was solely as an investor, the transaction complained of does not involve the transaction of the business of insurance as defined, and is therefore exempt. V.A.T.S. Insurance Code, art. 1.14-1 Sec. 2 and art. 18.23.

The Court finds that the cause of action based on the Texas Deceptive Trade Practices Act is unfounded and therefore need not be reached.

Arbitration

Defendant Oakeley Vaughan Underwriting, Ltd. has filed a motion urging that the arbitration clause in the contract be enforced. Although this Court is of the opinion it is valid, a final determination must be made by the English Court.

Letter of Credit

Coutts & Co., a foreign corresponding bank, who has refused to recognize the jurisdiction of this Court, has made a presentment upon the letter of credit in the amount of 61,243.30 pounds sterling (approximately $110,911.62 U.S.) and debited the account of First Interstate Bank.

By complying with its contracts with Coutts & Co. and the Plaintiff, First Interstate Bank is in the position of bearing the loss pending resolution of this lawsuit. If the Plaintiff prevails, the bank is without an adequate remedy unless it submits to the jurisdiction of the English courts. If the Defendants prevail, the bank is entitled to recover from the Plaintiff. This Court will not impose upon the Defendant bank that which the Plaintiff maintains it is unwilling to do, that is, seek redress in the English courts. Therefore, the Court finds that the temporary injunction should be dissolved.

Conclusion

Based on the totality of the circumstances, Defendants have met their burden and dismissal of this case is justified on the basis of *forum non conveniens*. The balance of convenience strongly favors the Defendants and justice will best be served by dismissing this action because this Court lacks personal jurisdiction over some or all of the Defendants, most of the parties reside in England, the events giving rise to the action occurred in England, the choice of law is English, and an identical proceeding is pending in England which the Plaintiff may join, resulting in more effective litigation. Therefore, it is

ORDERED that Defendants' motions to dismiss this case is GRANTED. It is further

ORDERED that Defendant First Interstate Bank's motion to dissolve the temporary injunction is GRANTED.

IT IS SO ORDERED.

Done at Houston, Texas, this 14th day of December, 1988.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAY D. HIRSCH,
Plaintiff

vs.

OAKELEY VAUGHAN, *et al,*
Defendants

CIVIL ACTION
NO. H-87-3727

FINAL JUDGMENT

The Court having granted Defendants' motions to dismiss, this case is DISMISSED with prejudice.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 14th day of December, 1988.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

IN THE

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FOR THE SOUTHERN DISTRICT OF TEXAS
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JAY D. HIRSCH,
Plaintiff
vs.
OAKELEY VAUGHAN, *et al*,
Defendants

CIVIL ACTION
NO. H-87-3727

ORDER

Based on Plaintiffs' motion to reconsider or, in the alternative motion to alter or amend judgment the Court has reconsidered its order of December 16, 1988. Dismissal was based on the common law doctrine of *forum non conveniens* not 28 U.S.C. § 1404(a). The reference to 28 U.S.C. § 1404 should be disregarded in the one sentence in which it appears.

After reconsideration of the remainder of the order the Court is still of the opinion that based on the totality of the circumstances of *forum non conveniens.*

Signed this 12th day of April, 1989 at Houston, Texas.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge